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THE WAR POWERS RESOLUTION: ITS IMPACT ON THE AMERICAN PUBLIC
AND CONGRESSIONAL SUPPORT CENTER OF GRAVITY

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A RESEARCH REPORT SUBMITTED TO THE FACULTY

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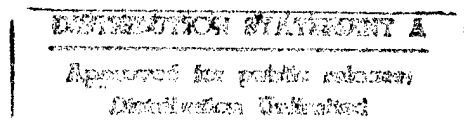
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ABSTRACT

TITLE: The War Powers Resolution: Its Impact on the American Public and Congressional Support Center of Gravity

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America has always had public and congressional support as a vulnerable center of gravity. The War Powers Resolution (WPR), enacted in 1973, has the effect of magnifying the vulnerability of this American center of gravity. This is particularly true in operations short of war, such as our recent deployments to Lebanon, Somalia, and Haiti. Although many have called for the repeal of the WPR because of its alleged constitutional defects and its impractical implementation, these calls have not led to any action. More importantly, these calls have not retarded the magnifying effect which the WPR has on America's public and congressional support center of gravity in operations short of war. Based on this last reason, the author contends the WPR should be repealed as proposed on January 4, 1995, by Senator Robert Dole.

BIOGRAPHICAL SKETCH

Lt Col Conrad M. Von Wald entered service in June, 1980, as an Assistant Staff Judge Advocate (ASJA) following graduation, *cum laude*, from Hamline University School of Law in December, 1979. He has a BA degree in Mathematics, *magna cum laude*, from St Thomas College where he was also a distinguished graduate of the Air Force ROTC program in May, 1977. Lt Col Von Wald's assignments include ASJA, Grand Forks Air Force Base (AFB), North Dakota; ASJA, Osan Air Base, Republic of Korea; Circuit Trial Counsel (regional prosecutor), Lowry AFB, Colorado; Associate Professor of Law, United States Air Force Academy; Staff Judge Advocate, Royal Air Force, Alconbury, United Kingdom; and Chief, Military Personnel Branch, Air Force Civil Litigation Division, Arlington, Virginia.

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I. Introduction

The War Powers Resolution has become “a dead letter. It just gets you involved in a fruitless standoff between Congress and the White House.”

Senator Daniel P. Moynihan (D, New York)
*The New York Times*¹

In 1973 Congress passed into law, over the veto of President Richard Nixon, the War Powers Resolution (WPR).² Through the WPR, Congress hoped to forcefully reinsert itself into the decision making process regarding the deployment of America's military forces into harm's way abroad. Passage of the WPR came at the end of America's most unpopular war, the Vietnam War, and in the midst of the most controversial period of constitutional challenge, the Watergate scandal.³ These circumstances drove Congress to reach beyond its constitutional authority in enacting the WPR. This congressional overreaching quickly revealed itself through repeated failures of the WPR to achieve for Congress a coequal involvement in the numerous military deployment decisions made since its enactment. These failures have led many to advocate the outright repeal of the WPR. In light of its history, a legitimate question arises: Is the WPR a dead letter or does it play a role in the national security decision making process?

It is my contention that the WPR has made a significant impact on decisions involving the deployment of American military forces outside the United States. This impact was not, as hoped for by the WPR proponents, the elevation of Congress to a coequal partner in the military deployment decision making process. Instead, enactment of the WPR led to an expansion of the congressional debate of these critical decisions by providing Congress a less contentious vehicle than the outright elimination of funding for troops deployed in the field. Additionally, in limited circumstances, it resulted in a direct

congressional impact on the termination of military deployments abroad. The reason for this limited success is the skillful use of the WPR as a sword against public and congressional support for the use of United States Armed Forces abroad by members of Congress.

With the shifting emphasis in the contemplated roles for the use of America's military forces in numerous military operations short of war following the end of the Cold War, the impact of the WPR, if not repealed, is likely to be of greater significance in the future. This paper will address the role that the WPR plays in the national security decision making process associated with the use of American military forces outside the United States. Primarily, it will examine the creation of the WPR and its primary provisions and discuss the reasons most frequently cited for the WPR's failures. I will then establish how America has, as a center of gravity in war, the support of its public and Congress, and how this center of gravity has allowed the WPR to achieve its limited "success" stories. Finally, I will examine how the WPR continues to serve as a congressional damper to America's commitment of military forces abroad.

II. The War Powers Resolution: Its Creation And Critical Provisions

Through the WPR, Congress attempted to clearly assert an equal voice in the use of military forces abroad. The WPR sets forth its purpose in its opening provision.

It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of *both the Congress and the President* will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.⁴ (emphasis added)

To enforce its asserted right to be a coequal partner in this critical decision making process, Congress inserted four exacting provisions into the WPR. The first is a reporting requirement mandating that the President, in the absence of a congressional declaration of war, report the introduction of America's military forces into hostilities, or situations where hostilities are imminent, to the House and Senate within 48 hours.⁵ Also related to time constraints, the second critical provision requires the President to terminate, within 60 days, the involvement of our military forces in such situations unless Congress extends the period or declares war.⁶ However, the WPR gives the President the authority to unilaterally extend this period up to an additional 30 days by providing Congress with a written notice of this necessity.⁷ It is critical to note the importance of this provision's structure. The WPR timetable is put into operation, *only if* the presidential report pulls the WPR trigger. Once the trigger is pulled, the President must seek or receive permission from Congress to continue the use of the military forces past the 60 (or 90) day period. Altogether, the provisions which allow for presidential action without congressional approval give the President a maximum of 92 days of deploying United States Armed

Forces in harm's way. The next WPR provision avoids reliance on the President for its operation, thereby avoiding this significant shortcoming.

The third major provision allows Congress to terminate the use of forces deployed by the President by the passage of a Concurrent Resolution.⁸ In order to invoke this provision, Congress must affirmatively act to cut off the President's use of forces. Congress can do so at any time. Finally, the WPR asserts that neither congressional appropriation acts nor ratified treaties shall serve as congressional authorization to use military forces unless specifically authorized by Congress.⁹ This provision attempts to preempt presidential reliance on existing United States commitments for the unilateral deployment of United States Armed Forces abroad.

As indicated above, Congress passed the WPR over President Nixon's veto. From the outset, the constitutionality of the WPR was in question. President Nixon's veto message clearly indicated where he stood on this issue:

The only way in which the Constitutional powers of a branch of the government can be altered is by amending the Constitution--and any attempt to make such alterations by legislation alone is clearly without force.¹⁰

Yet, the Constitution does not vest the war powers solely in the realm of either the legislative or the executive branches of government. Article 1 of the Constitution contains several passages that gave Congress various powers relating to military forces. These include the power; "To declare War," "To raise and support Armies," "To Provide and maintain a Navy," and "To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers."¹¹ However, at the same time, "the President is

given a general grant of all executive powers and is expressly designated as Commander-in-Chief over the Army and Navy of the United States.”¹²

This constitutional separation of the war powers does not give specific guidance as to which branch of government controls the employment of military force. It is this failure which creates the dilemma Congress sought to address via the WPR. Since World War II, Congress has essentially been left out of the decision making process regarding whether, when, and where American forces should be placed in harm's way. With the passage of the WPR, Congress hoped to change this course of action and put itself back into the middle of the military deployment decision making process. Unfortunately for Congress, that was not to be the case as an examination of the WPR in action discloses.

III. The WPR In Action: Why Has It Failed?

Questions regarding its constitutionality and the procedural problems associated with “triggering” the provisions of the WPR are often cited as the chief reasons for its failure. This section discusses the reality of these two problems as “limits” on the WPR’s effect.

Since its passage, no President has ever acknowledged the constitutionality of the WPR.¹³ Lieutenant Commander John W. Rolph, in an article written while he was serving as an Associate Professor of Law, International Law Division, the Judge Advocate General’s School, best summarized the contempt with which presidents have held the WPR.

More often than not, presidents simply ignore the Resolution as an unconstitutional attempt to infringe upon the Constitution’s delegation of the executive and Commander-in-Chief powers. No president has ever formally recognized or accepted the constitutionality of the Resolution, and the few attempts that have been made to comply with its terms were perfunctory at best.¹⁴

Not one president, since the passage of the WPR, has filed the type of report necessary to trigger the 60 day termination clock.¹⁵ Indeed, on only one occasion has a president even acknowledged the provision. President Ford referred to the triggering paragraph of the WPR, without invoking it, in his formal report to Congress concerning the Mayaguez incident.¹⁶ Of course, the incident ended by the time President Ford filed his report. Thus, for this situation, the compressed duration of the Mayaguez incident rendered the 60 day provision of the WPR completely irrelevant.

The importance of this treatment by the presidents of the WPR triggering mechanism cannot be overemphasized. Without presidential triggering of the automatic

termination period in the WPR, Congress can only impact presidential troop deployments by *affirmative action*. They must pass a joint congressional resolution under the WPR either preventing or terminating a military deployment. As indicated above, all the presidents have considered this provision of the WPR unconstitutional. As the following discussion will indicate, they are correct: The provision is clearly unconstitutional. Yet, it is an interesting commentary that the issue of constitutionality has not been a major stumbling block in congressional attempts to enforce its WPR.

The Presidents' beliefs regarding the unconstitutionality of this congressional enforcement mechanism are bolstered by substantial support. The United States Supreme Court, in *Immigration and Naturalization Service v. Chadha*,¹⁷ held that legislative vetoes of executive branch actions must comply with the express procedures for legislative action in the Constitution.¹⁸ One of those procedures, which the Supreme Court noted as absent in the legislation involved in *Chadha* case, was compliance with the Presentment Clause.¹⁹ Article I, section 7, of the Constitution requires that

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become [*sic*] a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections²⁰

From the holding in the *Chadha* case, it is clear that the Supreme Court would find any legislative provision failing to comply with the presentment requirement unconstitutional. The WPR provision requiring the President to withdraw forces on the sole basis of a joint resolution of Congress obviously fails to meet the constitutional requirement of the Presentment Clause. As such, this crucial WPR enforcement mechanism is unconstitutional and unenforceable in the federal courts.

Indeed, Congress itself recognizes this defect. In one of the many lawsuits brought by various members of Congress over the years since the WPR passage, the plaintiffs (110 members of the House of Representatives) specifically conceded the unconstitutionality of this enforcement mechanism.²¹ Additionally, in a report from the House Committee on Foreign Affairs reflecting the proceedings concerning the passage of a joint resolution directing the President to withdraw United States Armed Forces from Somalia, the committee expressly recognized the constitutional problem with the WPR.

The committee recognizes that there are multiple views on the constitutionality of various aspects of the War Powers Resolution. Since *I.N.S. v. Chadha*, 462 U.S. 919 (1983), however, it is highly likely that [1544(e)] would be held to be unconstitutional by any Federal court presented with that narrow question.²²

Many authors cite the unconstitutionality of the critical enforcement provision of the WPR as the main reason for its failure.²³ Although the federal courts have never specifically addressed the constitutional defect in the WPR respecting its enforcement mechanism, it is clear that all parties acknowledge its existence. Of course Congress could avoid this problem altogether if it were not for a more fundamental problem preventing the WPR from operation, that is, its ambiguous triggering provision.

The WPR becomes operative without unilateral congressional action if a president chooses to comply with the reporting requirement of Section 1543(a). The mere submission of the "required" report under this particular section triggers the 60 day period. The President must then terminate the use of United States Armed Forces unless authorized by Congress to continue the operation.²⁴ Since the procedures associated with this portion of the WPR do not run afoul of the Presentment Clause of the Constitution, the procedure avoids the constitutional problem. Why, then, hasn't this led to the

successful implementation of the WPR leading to the type of congressional involvement supposedly desired by Congress in its passage of the law?

The problem is that the WPR “never specifically defines what constitutes war for purposes of its oversight provisions.”²⁵ As Rolph points out, the difficulties with the triggering mechanism “arise primarily out of Congress’ optimistic assumption that the President would necessarily force congressional involvement in war powers by properly filing.”²⁶ Because of the ambiguity in the WPR, Rolph notes further, “[t]he President can easily frustrate the entire oversight mechanism by failing to state the section under which he is filing his report.”²⁷ An additional problem with the triggering mechanism is the failure of the WPR to define the term “hostilities.” Rolph cites two examples from the Reagan administration and one from the Bush administration that illustrate the problem.²⁸

An examination of the two incidents from the Reagan administration, Lebanon and Kuwait, realistically demonstrates the problem. The first involved the deployment of Marines to Lebanon as peacekeepers in late 1982. Despite the fact that Lebanese troops killed 2 Marines and injured 14 early in the deployment, President Reagan “insisted that ‘hostilities’ did not exist and were not ‘imminent.’”²⁹ The Reagan administration took a similar tack in avoiding the triggering mechanism during the 1987 Kuwaiti reflagging operations. They argued that the “frequent confrontations United States forces had with Iranian forces were ‘isolated’ and never rose to the level necessary to trigger [the reporting requirement].”³⁰ These two incidents show the definitional problem Congress unwittingly (although some might argue this was purposeful) wrote into the WPR. The third and final example is President Bush’s handling of the Gulf War situation. It shows just how problematic and frustrating this definitional problem can be for Congress.

To illustrate the absurd lengths presidents have gone to avoid the WPR triggering requirement, Rolph cites President Bush's report to Congress regarding the deployment of 230,000 armed combat troops to Saudi Arabia.³¹ In the report, President Bush stated, "I do not believe involvement in hostilities is imminent."³² Even after he had doubled the troop strength to afford the coalition forces an offensive option, President Bush's second report to Congress still maintained he, "did not believe that involvement in hostilities was imminent."³³ Given these incredulous assertions in the Gulf War situation, it would seem obvious that Congress could somehow force the issue of triggering their 60 day clock.

Initially, of course, Congress can avoid the "triggering" problem altogether by passage of a joint resolution requiring the President to remove United States Armed Forces. However, in addition to running Congress straight into the constitutional wall already discussed, it presents significant procedural problems. Second, Congress can resort to the federal courts to attempt to force a filing of the triggering report. These routes, to date however, have proved fruitless.

Congressional attempts to force a triggering report during the Kuwaiti reflagging operation in 1987 ended in defeat as a result of a Senate filibuster.³⁴ If Congress could count on presidential compliance with the trigger filing requirement, they would be able to avoid this likely fate. As this incident illustrates, by having to take affirmative action, rather than relying on the automatic termination provision, Congress has to deal with its own internal procedural hurdles. Although the WPR was designed to avoid the two thirds vote required to overcome presidential vetoes, it could not avoid the internal congressional mechanisms which can be effectively used to block legislation. The frustration Congress experienced in attempting a legislative detour around the procedural

“triggering” problem has been matched with equal frustration in attempts to go down the judicial trail.

In both the Kuwaiti reflagging operation and the Gulf War, numerous Congressional members attempted to force the issue by filing suits in federal courts. In *Lowry v. Reagan*, 110 members of Congress sued President Reagan to force the WPR reporting requirement in the Kuwaiti reflagging operation.³⁵ The federal court dismissed the case because they viewed it as a political issue barred from judicial review by the “political question doctrine.”³⁶ In essence, the federal court found the case to be outside their jurisdiction. The *Lowry* case was the fourth in a string of cases challenging Presidential failure to comply with the WPR. The three previous attempts all failed on jurisdictional grounds similar to, or related to, the political question doctrine cited by the court in the *Lowry* case.³⁷ Despite these many setbacks, Congress continues in its attempt to force the “triggering” issue in the federal courts.

In *Dellums v. Bush*, 54 members of Congress sued to prevent President Bush “from initiating an offensive attack against Iraq without first securing a declaration of war or other explicit congressional authorization for such action.”³⁸ Once again, this assault amounted to an attempt to trigger the WPR. This followed the deployment of sufficient additional forces to give the coalition forces an offensive option. The court did not dismiss the case based on the “political issue” grounds.³⁹ Initially, the court recognized that there were cases where it would be inappropriate for judicial action, implying that the court would defer to the political branches the determination as to whether particular hostilities might qualify as a war, “assuming that the issue is factually close or ambiguous

or fraught with intricate technical military and diplomatic baggage.”⁴⁰ However, the court concluded that, in the Gulf War situation it was confronted with,

the forces involved are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat, and it is therefore clear that congressional approval is required if Congress desires to become involved.⁴¹

In so finding, the Court clearly held that Congress has the right to determine whether or not any particular decision by the President to deploy United States Armed Forces abroad amounts to an action requiring their approval. However, the court dismissed the case because it found that the issue presented was not “ripe” for judicial review

unless the Congress as a whole, or by a majority, is heard from . . . it is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it.”⁴²

Although the court implied that there may be circumstances whereby the actions of the President alone may become sufficient to render the issue ripe for judicial review, even in the absence of a vote from a majority of the Congress, the court dismissed the suit as premature, i.e., not yet “ripe” for decision, because a majority of Congress had not brought it.⁴³ The importance of this ruling is that it clearly opens an avenue of attack to members of Congress. If they number a majority, they potentially can avoid the fate of a Senate filibuster. Despite this “silver lining,” this route offers little hope to those still in search of a means of bolstering the effect of the WPR. The problems include the usual slow pace of court proceedings and the unlikely event of being able to muster a majority of congressional members to join in a suit.

Based primarily on the WPR failures because of the legal and procedural problems discussed above, many agree with Senator Moynihan’s assertion that the WPR is a “dead letter.”⁴⁴ Rolph concisely sums up the position of WPR critics.

The serious constitutional and procedural problems that have handicapped the Resolution since its enactment appear to be insoluble. It is time for the Resolution to be repealed and for the executive and legislative branches to begin anew (within the framework of the Constitution) the examination of the proper distribution of war powers.⁴⁵

Another critic, Major Michael Kelly, advocated repeal of the WPR in an article, "Fixing the War Powers." Written during his studies towards receipt of a Master in Law program from the Army Judge Advocate's School, Kelly's article highlights these same problems. He describes the law as "ineffective, and [says it] does not comport with the original constitutional model."⁴⁶ Based on his discussion of these concerns, he concludes two principal considerations demand its repeal: "the constitutional and the practical."⁴⁷

Are the critics right . . . or has the WPR played a role in decisions regarding the use of United States Armed Forces? In contrast to the position of Rolph and Kelly, an examination of the shifting emphasis in the types of military operations, and a look at two specific instances where congress invoked the WPR to end military operations (albeit with the tacit consent of the President), suggest that the WPR is far from being a "dead letter." Indeed, these actions illustrate that the WPR provides an avenue for congressional involvement in decisions involving the use of force that is short of the draconian avenues of cutting off funding to deployed troops or outright impeachment of the President. It is my contention that the primary reason for the "successful" use of the WPR is directly attributable to the fact that public and congressional support is a critical center of gravity for America. The WPR makes an "attack" of this center of gravity easier to pursue. This, it is my contention, is the real danger posed by the WPR which should cause its repeal. To establish this argument, I will first address the critical nature of public and congressional support as a potential American center of gravity; then I will discuss several

operations since the passage of WPR which illustrate its effectiveness in thwarting United States military operations abroad.

IV. Public and Congressional Support, An American Center of Gravity?

Carl von Clausewitz is the originator of the concept of an enemy's "centers of gravity." In his now classical work, *On War*, Clausewitz posits:

A center of gravity is always found where the mass is concentrated most densely. It presents the most effective target for a blow; furthermore, the heaviest blow is that struck by the center of gravity. The same holds true in war.⁴⁸

Clausewitz further described a center of gravity as "the hub of all power and movement, on which everything else depends. That is the point against which all our energies should be directed."⁴⁹ Joint Pub 1, *Joint Warfare of the U.S. Armed Forces*, adopts Clausewitz' concept of centers of gravity and expresses it in more modern terms as, "[t]hat characteristic, capability, or locality from which a military force, nation, or alliance derives its freedom of action, physical strength, or will to fight."⁵⁰ Joint Pub 1's definition recognizes that a nation's "will" can be its center of gravity. For the United States, that "will" is encompassed in the phrase public and congressional support.

Although Clausewitz thought of centers of gravity, in a more traditional sense, as involving an enemy's army, its capital city, or its principal ally, he also recognized that public support was a potential center of gravity. He wrote that, "in popular uprisings [the center of gravity] is the personalities of the leaders and *public opinion*."⁵¹ Two examples from our history offer proof of the validity of Clausewitz' observation, as adapted by Joint Pub 1, with regard to our nations' center of gravity being its "will" to fight as expressed through public and congressional support: the American Civil War and the Vietnam War.

A. America's Public and Congressional Support Center of Gravity and the Civil War

Late in the summer of 1862 General Robert E. Lee, fresh from victory in the Second Manassas Campaign (Second Bull Run), decided to take the fight to enemy territory. In his biography of General Lee, Clifford Dowdy explains General Lee's decision to take the Army of Northern Virginia into Maryland in terms of its strategic significance. In Dowdy's words,

Lee was thinking in terms of morale effect of a withdrawal on the people of the North. He was thinking of morale effect in the larger political concept that embraced bringing to an end Northern support of the war.

Lee's ultimate purpose was to start a movement for peace. . . . [A] victorious Confederate Army loose in the North, presenting a threat to its major cities, could make the attempt to defeat the new nation appear a hopelessly drawn-out, disruptive struggle toward an uncertain end. There was no question that the Northern will to support the war was flagging and large segments of the population were passing from indifference to opposition.⁵²

Dowdy reaches his conclusions based on the clear intent of General Lee expressed in letters addressed by Lee to President Davis.⁵³ There can be no doubt from a reading of these letters--General Lee's intended to attack what he perceived to be the North's public and congressional support center of gravity. After moving his Army into Maryland, in a September 8, 1862, letter to Davis, Lee disclosed his intentions.

The present posture of affairs, in my opinion, places it in the power of the Government of the Confederate States to propose with propriety to that of the United States the recognition of our independence.

. . .

Such a proposition coming from us at this time, could in no way be regarded as suing for peace, but being made when it is in our power to inflict injury upon our adversary, would show conclusively to the world that our sole object is the establishment of our independence, and the attainment of an honorable peace. The rejection of this offer would prove

to the country that the responsibility of the continuance of the war does not rest upon us, but that the party in power in the United States elect to prosecute it for purposes of their own. The proposal of peace would enable the people of the United States to determine at their upcoming elections whether they will support those who favor a prolongation of the war, or those who wish to bring it to a termination.⁵⁴

Another biographer of General Lee, Douglas Southall Freeman, drew the same conclusions of Lee's decision to advance North following his victory at Second Manassas.

In Freeman's words,

Political not less than military advantage seemed to be offered in Maryland. . . . The presence of a large Confederate force above the Potomac, Lee reasoned, would not assure revolt against Federal authority, but it would give the people of Maryland what they had never had--a chance to express their will.⁵⁵

Numerous articles from the *New York Times* (several of which were reprinted from various Baltimore papers) between September 1 and September 10, 1862, confirm General Lee's intentions and the excitement Lee's actions stirred in Maryland. On September 7, 1862, the *New York Times* printed an article entitled, "The Plans of the Rebels, Correspondence of the Philadelphia Press," which reported that:

The generally accepted military theory is that the rebel armies will attempt to engage our troops at Fairfax, and, while diverting their attention, make a movement by the way of Leesburgh or Harper's Ferry, force a crossing at these points, occupy Maryland, and excite the secession feeling there into riot and anarchy . . .⁵⁶

A September 4, 1862, article, representative of many in the *New York Times*, recorded the public sentiments at the time.

Yesterday was, in its way, one of the most exciting days Baltimore has seen since the disturbance of the 19th of April, '61. No special manifestation revealed anything unusual in the condition of public feeling, yet it was evident, to any one familiar with Baltimore society, that the public mind was in a most feverish state.⁵⁷

Public opinion was ripe for exploitation.

There can be little doubt that Lee clearly believed his campaign into Maryland offered the opportunity to undermine the already flagging support for the war in the North and to help effect an end of the war via the political elections to be held that fall. The objective of his campaign was the public and congressional support which Lee perceived to be the North's center of gravity.

Although Lee's campaign North failed to achieve its objective, this was due to an accidental disclosure of the entire disposition of his Army. This disclosure led to a Northern victory, in a strategic sense, at Sharpsburg (Antitam) within days of Lee's excursion into the North and led to the humiliating withdrawal of Lee's forces from Northern territory.⁵⁸ Front-page headlines in the *New York Times* from September, 1862, which included, "Glorious News," "The Rebel Army of Invasion Being Terribly Punished," "The Defeat and Rout of the Rebels at All Points," "Another Great Battle Yesterday in Maryland," and "Surrender of Harper's Ferry," confirm the enormous swing in public mood following the Sharpsburg battle.⁵⁹ McClellan's strategic victory at Sharpsburg allowed President Lincoln the opportunity to issue the Emancipation Proclamation as a way to further rally popular support for the war.⁶⁰

Although it is merely speculation at this point in history, it seems reasonable to conclude that, had Lee's campaign into Northern territory resulted in the limited success Lee had hoped for, the public and congressional support for the war in the North may very well have crumbled. There can be little debate as to the correctness of Lee's strategy. Its failure was not due to its being wrong in objective, but defective in execution. Lee's objective required him to avoid a major confrontation with the Union Army while ranging

far and wide throughout Union territory in a relatively unchecked manner, convincing the North of the peaceful intentions of the South while demonstrating the lack of progress by the Northern Armies after nearly one and a half years of war. The correctness of Lee's strategic vision would be proven by Generals Grant and Sherman over the course of the remainder of the Civil War.

As history documents, we need not speculate as to the outcome of the similar strategy pursued by Generals Grant and Sherman throughout 1864 and into 1865. As an alternative to seeking the decisive battle to win the war, General Sherman proposed to Grant the objective of breaking "the will to resist of the enemy population behind the enemy armies by bringing the war home to civilians."⁶¹ T. Harry Williams, Boyd Professor of History at Louisiana State University, documents Grant's strategy for victory, as supplemented by Sherman.⁶² In the end, the South surrendered rather than carry on a guerrilla war, in part because of the complete breaking of the public's will to fight.

Our experiences in the Civil War offer very persuasive evidence that America's public and congressional support present a vulnerable center of gravity. However, as Professor Williams points out, Sherman's method of warfare was not enough to win total victory, "[t]he end would not come until the principal resisting force, Lee's army, was destroyed."⁶³ One hundred year later, the Vietnam War would illustrate dramatically that these Civil War experiences respecting attacks on America's public and congressional center of gravity were not unique in our history. Because of the similar nature of the political disharmony that existed during both wars, next to the Civil War, the Vietnam War best serves to further illustrate this American weakness. Indeed, McGeorge Bundy, a

former presidential advisor, compared the magnitude of the political aspect of the Civil War to that of the Vietnam Conflict. In his book, *America's Longest War: The United States and Vietnam, 1950-1975*, Dr. George C. Herring, professor of history at the University of Kentucky and editor of *Diplomatic History*, a quarterly journal, reports that, in 1967, Bundy "urged Johnson to 'visibly take command of a contest that is more political in its character than any other in our history except the Civil War. . .'"⁶⁴ The Vietnam War offers us a more recent and most persuasive example of the vulnerability which public and congressional support presents to our enemies as an American center of gravity. More importantly, unlike the Civil War, it is an example of our enemy's having achieved total victory through the pursuit of our public and congressional support center of gravity.

B. A Successful Attack of America's Public and Congressional Center of Gravity: The Vietnam Experience

Ho Chi Minh, North Vietnam's charismatic leader, is reported to have said: "If ever the tiger pauses, the elephant will impale him on his mighty tusks. But the tiger will not pause, and the elephant will die of exhaustion and loss of blood."⁶⁵ Ho's proverb presents in very simple terms the strategy North Vietnam pursued for successfully defeating its enemies. The essence of this strategy was its methodical draining of the enemy's "will" to fight.

Dr. Herring carefully documents the methodical degeneration of public support among Americans for the Vietnam War.⁶⁶ He concisely captures the mood of the country by 1967.

Support for the war dropped sharply during 1967. By the summer of that year, draft calls exceeded 30,000 per month, and more than 13,000 Americans had died in Vietnam. In early August, the President recommended a 10 percent surtax to cover the steadily increasing costs of the war. Polls taken shortly after indicated that for the first time a majority of Americans felt the United States had been mistaken in intervening in Vietnam, and a substantial majority concluded that despite a growing investment, the United States was not "doing any better." Public approval of Johnson's handling of the war plummeted to 28 percent by October. Waning public confidence was mirrored in the press and in Congress. . . . Members of Congress found it impossible to vote against funds for American forces in the field and hesitated to challenge the President directly, but many who had firmly backed him at first came out openly against him.⁶⁷

Ho Chi Minh's strategy was beginning to take effect. In late January, 1968, a Vietcong suicide attack on the American Embassy in Saigon, together with "the Tet Offensive, a massive, coordinated Vietcong assault against the major urban areas of South Vietnam,"⁶⁸ was described by Bernard Brodie as "probably unique in that the side that lost completely in the tactical sense came away with an overwhelming psychological and hence political victory."⁶⁹ Another author, Dr. Robert F. Turner, associate director of the Center for National Security Law at the University of Virginia, summed up the effects of the Tet Offensive.

The Tet Offensive was a major political victory for the Communists . . . because it was effectively used to persuade Americans that their government had been lying to them about progress and that the war could not be won at an acceptable cost.⁷⁰

Dr. Herring concluded that the Tet Offensive had as its purpose the exploitation of "the rising discontent with the war in the United States."⁷¹ By mid-March 1968, the Tet Offensive caused Johnson's ratings to plummet to 26 percent, and, on March 31, 1968, he terminated his reelection campaign.⁷²

With the election of Richard Nixon in November 1968, came a shift in strategy (already commenced towards the end of the Johnson presidency) calling for the gradual Vietnamization of the war.⁷³ This shift had the effect of temporarily quelling the public revolt against our involvement in the war.⁷⁴ By 1970, domestic protest was again on the rise.⁷⁵ By the end of the year, the antiwar movement was becoming "respectable."⁷⁶

By 1972, the North Vietnamese were confident of victory. Dr. Earl H. Tilford, Jr., associate professor of history at Troy State University and a past visiting professor of military history at the Air Command and Staff College, summarized the situation.

Because of Vietnamization, the bulk of American ground forces had been withdrawn, so the PAVN would face mostly ARVN units. Additionally, peace activists visiting Hanoi had assured their Communist hosts that antiwar sentiment was such that the American president would be in real trouble in the upcoming elections. Coupled with the way the American media was presenting the antiwar movement, the North Vietnamese leadership concluded that public sentiment and political pressures would prevent President Nixon from taking concerted action in 1972.⁷⁷

Although Linebacker I and II would prove this optimistic sentiment to be somewhat premature, the end, in fact, was very near. The strategy of slowly bleeding the United States of its public and congressional support was continuing to reap benefits. The 1968 election of Nixon, a Republican, freed up the Democrats from having "to choose between party loyalty and the public's increasingly clear mandate to terminate the conflict."⁷⁸

By the end on 1970, Congress had overcome its shyness from passing appropriations bills effectively cutting off funds from the troops in the field. Their first effort barred the use of funds for combat troops in Laos or Thailand.⁷⁹ In 1971, Congress repealed the Gulf of Tonkin Resolution, which had essentially vested complete authority

for conducting the war to President Johnson and his successor.⁸⁰ Within months of the January 1973, Paris Peace Agreement, Congress passed the Cooper-Church Amendment which “prohibited the use of appropriated funds for direct or indirect support of ‘combat activities in or over or off the shores of Cambodia, Laos, North Vietnam and South Vietnam’ after August 15, 1973.”⁸¹ As Dr. Turner points out, the Cooper-Church Amendment “was the signal Hanoi had been waiting for; Nixon and Kissinger had lost their “stick.”⁸² In essence, the North Vietnamese had won by swaying, first, U.S. public opinion, and ultimately, the U.S. Congress.

Our experiences in both the Civil War and the Vietnam War leave little doubt as to the existence of America’s public and congressional support center of gravity. The importance of this brief discussion of the role of America’s public and congressional support center of gravity as it played out in the Vietnam and Civil Wars is not only to establish its existence, but also to place in perspective the dangerous role which the WPR plays by enhancing the vulnerability of this critical American center of gravity.

It was within months of the conclusion of the Vietnam War that Congress passed the WPR. Congress’ intent, as has already been discussed, was “to [reassure] the public that no future president would be permitted to drag the nation into an unpopular foreign war against the will of the Congress.”⁸³ With this historical perspective in mind, we now turn to a review of more recent military involvements to discern whether the real impact of the WPR has been to increase the vulnerability of America’s public and congressional support center of gravity for operations other than war.

V. America's Overt Shift To Operations Other Than War And Its Implications For The WPR

Despite the hope for a drastic reduction in the need for military forces, the post Cold War era has seen an increased focus on operations other than war. In October 1992, then Chairman of the House Armed Services Committee, Representative Les Aspin (D-Wis.), described the situation as follows: "This brand new world of ours is a world of turmoil and agitation."⁸⁴ The article goes on, noting that "[a]round the globe, crises seem to cry out for the use of military force 'in a whole range of circumstances that don't fit' the military's desire for clear-cut missions and decisive force."⁸⁵ The author cites the Bosnian "ethnic cleansing" situation as an example calling for the use of military forces.⁸⁶ He envisioned a shift to "peace enforcement, peace making and peacekeeping" missions for American military forces.⁸⁷ Indeed, our recent history confirms the shift in focus from conventional troop deployments to operations other than war.

The recent deployment to Haiti marked the last in a string of military deployments to handle situations short of war.⁸⁸ The peacekeeping, peace enforcement, peace making, and humanitarian missions include deployments to Somalia, Bosnia, Rwanda, Guantanamo Bay, and the Middle East.⁸⁹ Additionally, humanitarian operations commenced shortly after the end of the Gulf War in northern Iraq.⁹⁰ This humanitarian operation quickly evolved into an operation designed to deny flights to Iraqi forces north of the 36th parallel in Iraq.⁹¹ A year later, the northern deny flight mission was joined by a deny flight mission covering the area south of the 32nd parallel.⁹² These missions are precisely the types of missions which have led to the passage of joint congressional resolutions under the auspices of the WPR forcing the end of military deployments.

The 1983 Lebanon deployment and the 1992-93 Somalia deployment are cited as “success” stories for the WPR.⁹³ Additionally, Congress has repeatedly called for an equal voice in determining the scope and length of several of these military deployments. A third potential situation facing WPR action involves the most recent deployment to Haiti. A discussion of these three examples reveals the limited role that the WPR plays in decisions to deploy United States Military Forces.

A. Deployment to Lebanon

On 25 September 1982, President Reagan deployed United States Marines to Lebanon as part of a multinational peacekeeping force pursuant to an agreement between the United States and Lebanon.⁹⁴ For more than a year, President Reagan avoided the automatic termination provisions of the WPR.⁹⁵ Although he filed a report regarding the deployment, “consistent with” the WPR, President Reagan claimed that he did not trigger the automatic termination provision of the WPR because “hostilities” did not actually exist.⁹⁶ When four United States Marines were killed and a number of other were wounded in the summer of 1983, Congress threatened to invoke the WPR directly.⁹⁷ This threat led to a negotiated compromise whereby President Reagan would gain specific Congressional authorization to keep the peacekeeping forces deployed for an additional period of 18 months. This was in exchange for his agreement to acknowledge “that ‘hostilities’ triggering the Resolution had become operative on August 29, 1983.”⁹⁸ Congress reflected this compromise in the first joint resolution passed pursuant to the WPR.⁹⁹ It specifically authorized the continued use of United States Armed Forces while specifying a date certain for the termination of the operation.¹⁰⁰

Although the WPR had not worked as originally envisioned, it nevertheless served its purpose of giving Congress a role in a military deployment. By agreeing to compromise in the face of threatened unilateral congressional action, President Reagan essentially forfeited the right to challenge the joint resolution as being unconstitutional. This concession allowed Congress to avoid the inevitable constitutionality confrontation awaiting any joint resolution passed under the WPR directing the termination of military operations. Finally, Congress successfully exercised some level of authority in the termination of a military operation without having to resort to a politically unpopular solution, namely, the termination of funding for deployed troops. Additionally, the constitutional and procedural problems put forth by WPR critics did not prevent the political accommodation, reached under the auspices of the WPR, which gave Congress its say in the use of United States Armed Forces abroad. Although the critics could dismiss the Lebanon example as an isolated example of limited success, the most recent WPR experience that led to the termination of the military deployment to Somalia refutes such criticisms.

B. Deployment to Somalia

In December 1992, shortly after his defeat in the presidential election, President George Bush deployed United States Armed Forces in OPERATION RESTORE HOPE for "the purpose of relieving mass starvation in Somalia."¹⁰¹ A Gallop Poll, conducted from 4-6 December, 1992, reported that, "[t]hree-quarters of Americans (74 percent) surveyed . . . say they approve of the decision to send U.S. troops, in the context of a United Nations effort to deliver relief supplies."¹⁰² In the spring of 1993, both the House

and Senate passed resolutions in support of this humanitarian mission.¹⁰³ During this period, the United Nations expanded their original mission to include the “mission of national reconciliation, . . . a broad mission of disarming the clans, . . . and a mission aimed primarily at capturing certain persons.”¹⁰⁴

On October 3, 1993, 13 American soldiers were killed and 77 were wounded in a Somali ambush.¹⁰⁵ This event decimated public support for the entire mission. David W. Moore captured the essence of the impact of the event in a Gallop Poll Article entitled, “Public: ‘Get Out of Somalia.’”

In the wake of graphic pictures showing American soldiers killed in Somalia, the American Public is overwhelmingly opposed to continued U.S. involvement in that country About seven in ten Americans want the U.S. to withdraw from Somalia

Two-thirds of the public say that the policy has been unsuccessful, and a majority (52 percent) say it was a mistake to get involved in Somalia in the first place.¹⁰⁶

In response to lawmakers’ calls for immediate withdrawal of troops, President Clinton, on October 7, 1993, sharply curtailed the mission of the deployed troops and promised to terminate the deployment altogether by March 31, 1994.¹⁰⁷ There was no attempt by the administration to calm the public and congressional waters, and there appears to have been no contemplation of returning the mission back to its highly successful original intent of relieving massive starvation.

Congressional critics of President Clinton seized the opportunity provided by the angry public reaction to wield the WPR sword. Despite the President’s promise, Congress passed a joint resolution on November 11, 1993, pursuant to the WPR, approving the use of United States Armed Forces only through March 31, 1994.¹⁰⁸ Once again, the WPR served its purpose of allowing Congress a greater role in a military deployment actions.

But more importantly, it disclosed again the vulnerability to attack which our public and congressional center of gravity presents to skillful politicians wielding the WPR.

C. Deployment to Haiti

On September 18, 1994, President Clinton sent United States Armed Forces to Haiti in OPERATION RESTORE DEMOCRACY.¹⁰⁹ Public support was divided. A Gallup Poll conducted the day after the deployment reported 46 percent in favor and 50 percent opposed.¹¹⁰ With the initial success and lack of American casualties, support rose slightly within the first week of the operation, with 54 percent in favor and 45 percent opposed.¹¹¹ Within days of the deployment, the *Air Force Times* reported that the House Foreign Affairs Committee approved a resolution "authorizing the troops to remain in Haiti through March 1, 1995, far enough into next year to allow another vote after Congress reconvenes in January."¹¹² If given a reason to act, Congress is poised to employ, once again, the WPR sword to end another overseas deployment of forces. Although conflict over this issue subsided with that resolution, the new Congress--in light of recent elections--may attempt to invoke the WPR in opposition to the Clinton administration's actions. Further congressional action appears to be directly contingent on the public's sentiment towards the Haitian operation. As long as public opinion remains at least divided on the subject, Congress is likely to hold in abeyance its WPR sword. However, once again Congress unsheathed the WPR sword and is prepared to use it as the vehicle to achieve its desired goals regarding another military deployment decision.

The use of the WPR in ending military deployments to Lebanon and Somalia, together with its threatened use to terminate the recent deployment of troops to Haiti,

illustrate the area where limited success in war powers decisions is available to Congress under the WPR. The reason for the successful use of the WPR in situations far short of war, despite the constitutional and procedural problems it possesses, is that decisions regarding the use of war powers are mainly political. Particularly when our vital national interests are not clearly threatened by a particular intervention, Congress stands a good chance of affecting the mood of the public and, hence, the political support for continuing a particular military deployment. It accomplished this impact by effectively threatening to use the WPR to force presidential compromises in terminating military deployments. This view is shared by other experts who have considered the war-making roles of Congress and the President.

In discussing the reasons why attempts to use the courts to sort out foreign policy disagreements concerning the war-making clause must fail, Arthur M. Schlesinger, Jr., correctly concludes "that the argument was not, save at its outer fringes, primarily constitutional. It was primarily political."¹¹³ Although a president may claim the WPR is unconstitutional, he will find little comfort in his claim when confronting the electorate. Presidential defiance of a congressional resolution portends incredible political risk. Indeed, although every president has disputed the resolution's constitutionality, they have routinely filed reports "consistent with" the WPR,¹¹⁴ thereby scrupulously avoiding the trigger.

In his article, Kelly concluded that passage of a nonbinding "Sense of Congress" is the one area Congress can act to effectively check the use of war powers by the President.¹¹⁵ He notes,

Congress can pass them rapidly by a simple majority vote. Congress can use these declarations in conjunction with strategies to marshal public support or in conjunction with its investigatory functions, which rapidly focus public attention. Either way, Congress can generate significant political pressure on the President.¹¹⁶

In so arguing, Kelly recognizes that the war powers process is essentially political. In the final analysis, the manner in which Kelly argues a nonbinding resolution should be used is precisely how Congress has successfully employed the WPR in achieving the results it garnered in Lebanon and Somalia.

Kelly further argues, albeit in support of the repeal of the WPR, that

Congress arguably has used the WPR for political purposes--to attack the policies of presidents from the minority party; or more commonly, to ensure that Congress will not be held accountable for military failure.¹¹⁷

Once again, Kelly's observations merely confirm that war powers decisions are essentially political. Regardless of the vehicle selected by Congress to achieve its role in the war powers arena, whether it be by nonbinding resolutions or the WPR, Congress will never be able to divorce the process from its political realities.

Another author, after observing the political nature of war powers decisions, offered an insightful view as to why Congress may be very satisfied with the WPR. David Kaplan, a senior writer for *Newsweek*, after concluding the WPR is a "paper tiger," notes that "[l]egislators actually may like it that way. If presidential strategy works, they applaud. If not, then they make political hay."¹¹⁸

VI. Conclusion

There can be no doubt that the WPR has significant constitutional and procedural problems. These problems prevent the WPR from elevating Congress to a coequal status in the war powers decision making process, its original purpose. In spite of these constraints, the WPR has been effectively used by Congress to force the termination of military deployments in operations short of war.

Far from being "dead letter," the WPR continues to play a role in the national security decision making process. That role, however, is primarily political. The WPR provides a vehicle for Congress to impact military deployment decision (short of the unpopular and unrealistic choices of cutting off funding or outright impeachment). Presidential reporting under the WPR offers Congress an opportunity to debate the issues and to take action where--and when--Congress chooses. Member of Congress opposed to a particular deployment can use these debates to help shape public opinion and, ultimately, dissipate vital congressional support. It is in this manner that the WPR has greatly elevated the vulnerability of the American public and congressional support center of gravity. It is this result which mandates repeal of the WPR.

On January 4, 1995, the first day of 104th Congress, Senate Majority Leader Robert Dole, introduced Senate Bill 5, entitled The Peace Powers Act of 1995. The primary purpose of this bill is to repeal the WPR. Senator Dole summarized the negative impact of the WPR.

[T]he War Powers Resolution did not end division between the executive and legislative branches--it provided a focus for such division and may have actually increased disputes between the branches. In my view, the focus was unhealthy: automatic termination of American troop deployments if

Congress did not act. Congress spent hours debating "imminent hostilities" and other definitional matters--rather than the important policy issues relating to war and peace.

...

... When an American President acts in defense of American interests, the President should have all the flexibility provided in the Constitution--not be subject to an automatic "trigger" or a 60-day time clock.¹¹⁹

In essence, Senator Dole recognizes the impact political wrangling, engendered by the WPR, has had on the flexibility presidents need to deal effectively with threats to our national interests. The WPR has only served to hamstring presidential efforts by making them much more susceptible to the vagaries of public and congressional support. We can only hope the Peace Powers Act of 1995 will restore to the President the flexibility needed to effectively defend U.S. national interests through appropriate use of U.S. forces.

VII. NOTES

¹ "Sorting Out Legal War Concerning Real War," *New York Times*, 15 November 1990, sec. 1, p. A18.

² Cruden, "The War-making Process," 69 Mil. L. Rev. 36 (1975).

³ *Ibid.*, p. 36.

⁴ War Powers Resolution, 50 U.S.C. , sec. 1541(a) (1973).

⁵ War Powers Resolution, 50 U.S.C. , sec. 1543(a) (1973).

⁶ War Powers Resolution, 50 U.S.C. , sec. 1544(b) (1973).

⁷ War Powers Resolution, 50 U.S.C. , sec. 1544(b) (1973).

⁸ War Powers Resolution, 50 U.S.C. , sec. 1544(e) (1973).

⁹ War Powers Resolution, 50 U.S.C. , sec. 1547(a) (1973).

¹⁰ President's Veto of War Powers Resolution. 9 Weekly Comp. Pres. Doc. 1285-1286 (Oct. 24, 1973) cited by Rolph, "The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm," 43 Merc. L. Rev. n. 7, 646-647 (1992).

¹¹ U.S. Const. Art. I, sec. 8.

¹² Rolph, "The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm," 43 Merc. L. Rev. 647 (1992). Rolph cites the U.S. Const. art. II, sec. 1, 2 at n. 9, page 647.

¹³ Kelly, "Fixing the War Powers," 141 Mil. L. Rev. 89 (1993).

¹⁴ Rolph, "The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm," 43 Merc. L. Rev. 650 (1992).

¹⁵ *Ibid.*, p. 657.

¹⁶ 121 Cong. Rec. 14,427 (1975), cited by Rolph, "The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm," 43 Merc. L. Rev. n. 49, 659 (1992).

¹⁷ *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 956-57 (1983).

¹⁸ *Ibid.*, pp. 956-57.

¹⁹ *Ibid.*

²⁰ U.S. Const. Art. I, sec. 7.

²¹ *Lowry v. Reagan*, 676 F.Supp. 333, 335 n. 12 (1987). Plaintiffs' having conceded the issue of constitutionality in this case is on no legal presidential in as much as the court found it did not have jurisdiction to consider the case in the first place. *Id.* at 334.

Nevertheless, the concession of this issue revealed the willingness of members of Congress to recognize the constitutional defect.

²² Committee on Foreign Affairs, Report Concerning the Removal of U.S. Armed Forces from Somalia, H.R. Rep. No. 103-329, 103rd Cong., 1st sess., 2 (1993).

²³ See, e.g., Cruden, "The War-making Process," 69 Mil. L. Rev. 99, 131 (1975); Rolph, "The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm," 43 Merc. L. Rev. 652 (1992) (In footnote 24, Rolph cites to a number of law review articles which "thoroughly scrutinize the difficult constitutional issues that have rendered the Resolution virtually impotent." In his conclusion, Rolph cites the "serious constitutional and procedural problems that have handicapped the Resolution" as justification for its repeal. *Id.*, at 665); and Kelly, "Fixing the War Powers," 141 Mil. L. Rev. 152-155, 166 (1993) (Kelly advocates fixing the WPR, versus its outright repeal, based on the constitutional and practical problems which currently exist).

²⁴ War Powers Resolution, 50 U.S.C. , sec. 1544(b) (1973).

²⁵ Rolph, "The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm," 43 Merc. L. Rev. 656 (1992).

²⁶ *Ibid.*, p. 657.

²⁷ *Ibid.*

²⁸ *Ibid.*, p. 658 and n. 44.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*, p. 658.

³² Letter from President George Bush to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 26 Weekly Comp. Pres. Doc. 1229 (Aug. 9, 1990), cited by Rolph, "The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm," 43 Merc. L. Rev. n. 45, 658 (1992).

³³ Letter from President George Bush to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 26 Weekly Comp. Pres. Doc. 1834 (Nov. 16, 1990), cited by Rolph, "The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm," 43 Merc. L. Rev. n. 46, 658 (1992).

³⁴ 46 Cong. Q. Wkly. Rep. 2595, 2596 (1987), cited by Rolph, "The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm," 43 Merc. L. Rev. n. 47, 659 (1992).

³⁵ *Lowry v. Reagan*, 676 F.Supp. 334 (D.D.C. 1987). Three Senators, originally parties to the suit, withdrew from the action, *Id.* at n. 1, p. 334.

³⁶ *Ibid.*, pp. 337, 339-41.

³⁷ The three cases were: (1) *Crockett v. Reagan*, 558 F.Supp. 83 (D.D.C. 1982), *aff d*, 720 F.2d 1355 (D.C.Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (29 members of Congress sued to prevent President Reagan from providing military aid to the government of El Salvador); (2) *Sanchez-Espinoza v. Reagan*, 568 F.Supp. 596 (D.D.C. 1983), *aff d*, 770 F.2d 202 (D.D.Cir. 1985) (12 members of Congress sued President Reagan for damages, injunctive relief and a declaration that he had violated the WPR by supporting paramilitary operations designed to overthrow the government of Nicaragua); and (3) *Conyers v. Reagan*, 578 F.Supp. 324 (D.D.C. 1984), *aff d on other grounds*, 765 F.2d 1124 (D.C.Cir. 1985) (11 members of Congress challenged the invasion of Grenada as a violation of the WPR).

³⁸ *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1991). The *Dellums* case was one of a number of lawsuits filed by members of Congress challenging President Bush's deployment of troops to the Gulf without prior consultation with Congress in violation of the WPR. Other cases include *Ange v. Bush*, 752 F.Supp. 509 (D.D.C. 1990) and *Pietch v. Bush*, 755 F.Supp. 62 (E.D.N.Y. 1991). These two cases were dismissed based on various jurisdictional grounds.

³⁹ *Ibid.*, p. 1145.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*, p. 1151.

⁴³ *Ibid.*, pp. 1151-52.

⁴⁴ "Sorting Out Legal War Concerning Real War," *New York Times*, 15 November 1990, sec. 1, p. A18.

⁴⁵ Rolph, "The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm," 43 *Merc. L. Rev.* 665 (1992).

⁴⁶ Kelly, "Fixing the War Powers," 141 *Mil. L. Rev.* 157 (1993).

⁴⁷ *Ibid.*, p. 166.

⁴⁸ Carl von Clausewitz, *On War*, ed. and trans. by Michael Howard and Peter Paret, (Princeton: Princeton University Press, 1989), p. 485.

⁴⁹ *Ibid.*, p. 596.

⁵⁰ Joint Pub 1, *Joint Warfare of the U.S. Armed Forces*, 11 Nov 1991, p. 34

⁵¹ Carl von Clausewitz, *On War*, ed. and trans. by Michael Howard and Peter Paret, (Princeton: Princeton University Press, 1989), p. 596 (emphasis added).

⁵² Clifford Dowdy, *Lee*, (Boston: Little Brown, 1965), pp. 297-298.

⁵³ *Ibid.*, pp. 297-298.

⁵⁴ *Ibid.*, p. 299.

- ⁵⁵ Douglas Southall Freeman, *R. E. Lee: A Biography*, 4 vol. (New York: Charles Scribner, 1934), vol. 2, p. 351
- ⁵⁶ "The Plans of the Rebels, Correspondence of the Philadelphia Press," *New York Times*, 7 September 1862, p. 1.
- ⁵⁷ "The Feeling in Baltimore," *New York Times*, 6 September 1862, p. 1.
- ⁵⁸ Clifford Dowdy, *Lee*, (Boston: Little Brown, 1965), pp. 301-317.
- ⁵⁹ *New York Times*, 16 and 17 September 1862, p.1.
- ⁶⁰ *Ibid.*, p. 298.
- ⁶¹ T. Harry Williams, *The History of American Wars: From 1745 to 1918* (1981), p. 299.
- ⁶² *Ibid.*, pp. 291-302.
- ⁶³ *Ibid.*, p. 301.
- ⁶⁴ George C. Herring, *America's Longest War: The United States and Vietnam, 1950-1975*, 2nd ed., (New York: Newbury Awards Records, 1986), p. 184.
- ⁶⁵ Quoted in Jean Lacouture, *Ho Chi Minh: A Political Biography* (New York, 1968), p. 171.
- ⁶⁶ George C. Herring, *America's Longest War: The United States and Vietnam, 1950-1975*, 2nd ed., (New York: Newbury Awards Records, 1986)
- ⁶⁷ *Ibid.*, p. 174.
- ⁶⁸ *Ibid.*, p. 186.
- ⁶⁹ Quoted in George C. Herring, *America's Longest War: The United States and Vietnam, 1950-1975*, 2nd ed., (New York: Newbury Awards Records, 1986), p. 187.
- ⁷⁰ Robert F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*, (Washington D.C., Macmillan Press, 1991), p. 27.
- ⁷¹ George C. Herring, *America's Longest War: The United States and Vietnam, 1950-1975*, 2nd ed., (New York: Newbury Awards Records, 1986), p. 187.
- ⁷² *Ibid.*, p. 202, 207.
- ⁷³ *Ibid.*, p. 229.
- ⁷⁴ *Ibid.*, p. 226-227.
- ⁷⁵ *Ibid.*, p. 227.
- ⁷⁶ *Ibid.*, p. 230.
- ⁷⁷ Earl H. Tilford, Jr., *Setup: What the Air Force Did in Vietnam and Why*, (Maxwell Air Force Base, Alabama: Air University Press, 1991), p. 221.
- ⁷⁸ Kelly, "Fixing the War Powers," 141 Mil. L. Rev. 85 (1993).

⁷⁹ Robert F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*, (Washington D.C., Macmillan Press, 1991), p. 30.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, p. 32.

⁸² *Ibid.*

⁸³ Robert F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*, (Washington D.C., Macmillan Press, 1991), p. 33.

⁸⁴ William Matthews, "After the Cold War: Military 'Peace Enforcers'?" *Air Force Times*, 12 October 1992, p. 18.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Vago Muradian, "Here We Go Again, This Time it's Haiti," *Air Force Times*, 3 October 1994, p. 12.

⁸⁹ *Ibid.*

⁹⁰ Julie Bird, "Provide Comfort Extended as Iraqi Force Grows," *Air Force Times*, 13 July 1992, p. 4.

⁹¹ *Ibid.*

⁹² William Matthews, "U.S. Troops Braced for Standoff With Iraq," *Air Force Times*, 7 September 1992, p. 6.

⁹³ Multinational Force in Lebanon Resolution, Pub. L. 98-119, Oct. 12, 1983, 97 Stat. 805; and Duration of Authorization for United States Participation in Multinational Force in Somalia, Pub. L. 103-139, Title VIII, sec. 8151, Nov. 11, 1993, 107 Stat. 1475.

⁹⁴ Multinational Force in Lebanon Resolution, Pub. L. 98-119, Oct. 12, 1983, 97 Stat. 805.

⁹⁵ Rolph, "The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm," 43 *Merc. L. Rev.* 651, n. 21 (1992).

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Multinational Force in Lebanon Resolution, Pub. L. 98-119, Oct. 12, 1983, 97 Stat. 805.

¹⁰⁰ *Ibid.*

¹⁰¹ Duration of Authorization for United States Participation in Multinational Force in Somalia, Pub. L. 103-139, Title VIII, sec. 8151, Nov. 11, 1993, 107 Stat. 1475.

¹⁰² Lydia Saad, "'Operation Restore Hope' Gets Public's Blessing," *The Gallup Poll Monthly*, December 1992, p. 18.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Julie Bird, "What's Next in Somalia?" *Air Force Times*, 18 October 1993, p. 12.

¹⁰⁶ David W. Moore, "Public: 'Get out of Somalia,'" *The Gallup Poll Monthly*, October 1993, p. 23.

¹⁰⁷ *Ibid.*

¹⁰⁸ Duration of Authorization for United States Participation in Multinational Force in Somalia, Pub. L. 103-139, Title VIII, sec. 8151, Nov. 11, 1993, 107 Stat. 1475.

¹⁰⁹ Vago Muradian, "Here We Go Again, This Time it's Haiti," *Air Force Times*, 3 October 1994, p. 12.

¹¹⁰ Dr. Frank Newport and Leslie McAnemy, "Haiti Yields Clinton Small 'Rally Effect,'" *The Gallup Poll Monthly*, September 1994, p. 18.

¹¹¹ *Ibid.*

¹¹² Rick Maze, "Congress Eyes March 1 as Pullout Date," *Air Force Times*, 10 October 1994, p. 15.

¹¹³ Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin Company, 1973), p. 287.

¹¹⁴ From 1973 through 1989, presidents submitted 19 reports to Congress under the WPR. Ellen C. Collier, Library of Congress, Congressional Research Service, *War Powers Resolution: Presidential Compliance*, (September 20, 1989) p. 1.

¹¹⁵ Kelly, "Fixing the War Powers," 141 Mil. L. Rev. 154 (1993).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, p. 155, citing Robert F. Turner, *Repealing the War Powers Resolution*, pp. 121-127 (Kelley notes that Turner cites and analyses four cases in which congressman have used the WPR for political purposes)

¹¹⁸ David A. Kaplan, "A Tug of War over War Powers," *Newsweek*, 10 December 1990, p. 36.

¹¹⁹ U.S. Congress, Senate, Senator Dole speaking for the introduction of The Peace Powers Act of 1995, S. 5, 104th Congress, 1st sess., 4 January 1995. *Congressional Record*, vol. 141, pp. S101-S102.

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